IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 82 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO No

2. To be referred to the Reporter or not? Yes :

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO No

5. Whether it is to be circulated to the Civil Judge? No :

MAHENDRABHAI SHYAMSUNDER PUROHIT

Versus

STATE OF GUJARAT

Appearance:

MR HM PARIKH for Petitioner

Shri M.A.BUKHARI, A.P.P. for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 29/08/2000

ORAL JUDGEMENT

1. This revision is directed against the order dated 7th February 1998 of Additional Sessions Judge, Kheda at Nadiad, allowing the Application u/s. 319 of the Code of Criminal Procedure and taking cognizance against the defence witness Mahendrabhai Shyamsundar Purohit for abeting in commission of offences punishable under Sections 366 and 376 read with Section 114 of the Indian Penal Code as well as under Section 5 of the Child Marriage Restraint Act (for short "the Act").

2. Shri H.M.Parikh for the revisionist and Shri M.A.Bukhari, learned A.P.P. have been heard.

3. Shri Parikh has urged that the impugned order cannot be sustained in view of the latest verdict of the Apex Court in Ranjit Singh v/s. State of Punjab, reported in A.I.R. 1998 SC 318. He has also urged that in view of the case of Delhi Municipality v/s. Ram Kishan reported in AIR 1983 SC 67 the impugned order cannot be sustained. Lastly relying upon the Division Bench pronouncement of the Kerala High Court in M.P. Gangadharan v/s. State S.I. of Police, reported in 1989 Cri.L.J. 2455 he has urged that in view of Section 132 of the Evidence Act also the defence witness could not be prosecuted for the substantive offences under which he is proposed to be prosecuted under the impugned order.

4. As against this Shri M.A.Bukhari has contended that the power of the Sessions Judge was properly exercised inaccordance with Section 319 Cr.P.C. and he found material on record from which he could have taken cognizance against the defence witnesses u/s. 366, 376 read with Section 114 of the I.P.Code and under Sec.5 of the Act.

5. In order to appreciate these contentions reference to Section 319 Cr.P.C. becomes essential and it has to be seen what are the powers of Sessions Judge in this section and how these powers can be exercised.

6. Section 319 (1) Cr.P.C. provides that where, in the course of any inquiry into or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the court may proceed against such person for the offence which he appears to have committed.

7. In order to appreciate the provisions of this section it has to be kept in mind and it has to be understood what is the meaning of the word "evidence" used in Section 319(1) Cr.P.C. There has been consistent view that the word "evidence" under this section means evidence collected by the prosecution during inquiry or trial and not that it includes defence evidence. In the case before me what happened was that the main accused Ramesh Manjibhai was being tried under Sections 363, 366 and 376 of the I.P.Code. Inquiry was completed and committal proceedings ended whereafter the main accused was committed to stand trial under the main sections. The charges were framed against the main accused. The

prosecution witnesses were examined. In all the prosecution examined six witnesses and thereafter the prosecution closed its evidence. The accusded entered in defence and he examined Mahendrabhai Shyamsundar Purohit as the first defence witness, who is revisionist before me. He is said to be the person who solemnized the marriage between the main accused Ramesh Manjibhai and the prosecutrix Kanak @ Pintu. He also tendered one Affidavit before the learned Sessions Judge deposing that the prosecutrix was aged about 19 years. This factual aspect has not been considered by the learned Addl. Sessions Judge. On the other hand unnecessary critisism has been made by the Addl. Sessions Judge against this witness that he did not make inquiry about the age of the prosecutrix. He also made adverse comments about the knowledge of the revisionist as to how Hindu Marriages are to be solemnized. However, it is not a case where this single marriage has been solemnized by the revisionist. On the other hand he stated that he has solemnized more than 500 marriage of this type. Consequently it can be said that at the most he is a professional who is performing and solemnizing such marriages. Consequently the criticism that this witness did not know the meaning of word "Saptapadi", "Sagotra", "Rashi", etc. has no relevance for deciding the application under Section 319 Cr.P.C. The fact remains that this witness was examined only to show that it was not a case of abduction, kidnapping or rape against the prosecutric rather the prosecutrix was legally wedded wife of the accused. As indicated above the defence evidence, to my mind, could not be considered for the purposes of Section 319 Cr.P.C. for taking cognizance against the defence witness.

8. Moreover on facts it has to be seen whether there was any prima facie evidence against the revisionist under Section 366 and 376 read with Section 114 I.P.Code. Actually when the abduction took place this witness viz. the revisionist was not present and he did not offer any alurement to the prosecutrix that she would be married against her will with the main accused. His presence at the time of kidnapping or abduction was not found out during investigation or the inquiry. Consequently there was no evidence against him on which cognizance under Section 366 can be taken nor he can be said to have abeted commission of offence punishable u/s. 366 I.P.Code.

9. Likewise it will be going too far to infer at this stage that the revisionist committed offence of abetement in abeting the main accused to commit rape with

the prosecutrix. No evidence has been referred by the Addl. Sessions Judge that the prosecutrix was raped before the revisionist performed marriage between the accused and the prosecutrix. If after marriage sexual intercourse was had by the main accused with the prosecutrix it cannot be said to be an abetement of commission of offence of rape by the witness. Thus, prima facie whatever material was there on record it did not justify the Addl. Sessions Judge to proceed against the revisionist u/s. 366 and 376 read with Section 114 I.P.C.

10. Then remains commission of offence u/s. 5 of the Child Marriage Restraint Act. It may be mentioned that the main accused was not prosecuted under this section. It is only on the application u/s.319 Cr.P.C. which can safely be said to be misconceived application of the prosecution that the revisionist was likely to be prosecuted under Section 5 of the Act. The observation of the Addl. Sessions Judge that the revisionist did not care to inquire the age of the prosecutrix is uncalled for. Further observation of the Addl. Sessions Judge that the revisionist should have known the marriageable age of the bride and the bride-groom under the Hindu Marriage Act is also uncalled for. He has ignored the Affidavit tendered by the revisionist while he was in the witness box as defence witness wherein he deposed that the age of the prosecutrix was 19 years. There was no counter Affideavit from the side of the prosecution controverting this Affidavit of the revisionist. Consequently prima facie there was no evidence before the Addl. Sessions Judge to take cognizance against the revisionist u/s. 5 of the Act.

11. Thus, on factual side the learned Addl. Sessions Judge committed an error in proceeding and taking cognizance against the revisionist under the aforesaid Section.

12. Needless to say that the powers under Section 319 Cr.P.C. are to be sparingly exercised. When it comes in evidence either before the inquiry or during trial that a person not being the accused has committed certain offence for which he could be tried together with main accused the court can proceed against such person. Certain safe-guards have been recently laid down by the Apex Court in such matters. The latest verdict of the Apex Court is to be found in the case of Ranjit Singh v/s. State of Punjab, reported in AIR 1998 SC 3148. In this case the Apex Court has over-ruled its earlier decision in Kishun Singh v/s. State of Bihar, reported

in 1993 AIR SCW 771 = (1993) 2 SCC 16. The observation of the Apex Court in Kishun Singh case (Supra) was as follows :

"On the Magistrate committing the case under Section 209 to the Court of Session the bar of Section 193 is lifted thereby investing the Court of Sessions complete and unfettered jurisdiction of the court of original jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the commission of the crime can prima facie be gathered from the material available on record."

Over-ruling the earlier decision of the Apex Court in Kishun Singh case (Supra), the Apex Court proceeded to observe that the power of the Sessions Court under S. 193 of the Code to take cognizance of the offence does not include the summoning of the person or persons whose complicity in the commission of the trial can prima facie be gathered from the materials available on record. Once the Sessions Court takes cognizance of the offence pursuant to the committal order the only other stage when the Court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers under S. 319 of the Code can be invoked. Further when all the materials produced by the investigating agency would clearly show the positive involvement of a person who was not shown in the array of accused due to some inadvertance or omission, then it is open to the Sessions Court to send a report to the High Court detailing the situation so that the High Court can in its inherent powers or revisional powers direct the committing Magistrate to rectify the committal order by issuing process to such left out accused. But said procedure need be resorted to only for rectifying or correcting such grave mistake.

In Para : 19 of the Judgment, the Apex court has made it clear that once the Sessions Court takes cognizance of the offence pursuant to the committal order the only other stage when the Court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers under Section 319 of the Code can be invoked. It was further observed that we are unable to find any other power for the Sessions Court to permit addition of new person or persons to the array of the accused. Of course it is not necessary for the Court to wait until the entire evidence is collected for exercising the said powers.

13. It is, therefore, clear from the aforesaid observation in Para : 19 of this Judgment that the word "evidence" means evidence collected during inquiry, investigation and evidence tendered by the prosecution and not the defence evidence. On the basis of defence evidence the defence witness cannot be hauled up for the offence for which the main accused is to be tried.

14. In Para : 22 of the Judgment the Apex Court further observed that though such situation may arise only in extremely rare cases the Sessions Court is not altogether powerless to deal with such situation to prevent miscarriage of justice. It is then open to the Sessions Court to send a report to the High Court detailing the situation so that the High Court can in its inherent powers or revisional powers direct the committing Magistrate to rectify the committal order by issuing process to such left out accused. But we hasten to add that the said procedure need be resorted to only for rectifying or correcting such grave mistake.

15. Since the learned Addl. Sessions Judge has not followed the directions of the Apex Court in referring the matter to the High Court it can be said that the impugned order is illegal and cannot be sustained.

16. In Municipal Corporation of Delhi v/s. Ram Kishan Rohtagi & ors., reported in A.I.R. 1983 SC 67, at page 71, it has been observed that if the prosecution can at any stage produce evidence which satisfies the Court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the Court can take cognizance against them and try them along with the other accused. But, we would hasten to add that this is really an extraordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken.

17. It is therefore clear from the above observations of the Apex Court that firstly the power under Section 319 should be sparingly exercised by the Court. Secondly such power has to be exercised on the strength of the evidence adduced by the prosecution. In the case before me there is no iota of evidence in the deposition of six prosecution witnesses implicating the revisionist under the sections for which he is proposed to be tried under the impugned order. Consequently there was no justification in taking cognizance under Section 319 Cr.P.C. against the revisionist.

18. Shri Parikh has relied upon the Division Bench pronouncement of Kerala High Court in M.P. Gangadharan v/s. State S.I. of Police, reported in 1989 Cri. L.J. 2455 and has contended that in view of proviso to Section 132 of the Evidence Act the defence witness who is the revisionist before this Court could not be prosecuted. However, this verdict has only persuasive authority for this Court which is also distinguishable on facts.

19. For the reasons stated above it can be concluded that there were no compelling circumstances under which extra-ordinary jurisdiction and power under Section 319 of Code of Criminal Procedure should have been exercised by the learned Addl. Sessions Judge. Further there was no material before the Addl. Sessions Judge for taking cognizance against the defence witness viz. the revisionist under Sections 366, 376 read with Section 114 of the I.P.Code and Section 5 of the Child Marriage Restraint Act. Consequently the impugned order is illegal hence it cannot be sustained.

20. The Revision is therefore allowed. The impugned order is set aside. The application of the prosecution u/s. 319 Cr.P.C. is hereby rejected.

sd/-

Date : August 29, 2000 (D. C. Srivastava, J.)

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